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Pursuant to the Board's Rules and Regulations, Respondent Raymond Interior Systems, Inc. ("Raymond") moves for reconsideration of the Board's Decision and Order in the above-captioned cases, dated September 30, 2010, and reported at 355 NLRB No. 209. This Decision and Order adopted the Decision and Order of the two-member Board panel dated September 30, 2009, and reported at 354 NLRB No. 85.

I. MOTION FOR RECONSIDERATION

Raymond moves for reconsideration of the Board's Decision and Order as follows:

First, Raymond moves for reconsideration of the Board's failure to rule on the validity of the Confidential Settlement Agreement, which Raymond and the Carpenters contended constituted a valid Section 8(f) agreement covering the drywall finishing employees previously represented by the Painters under an 8(f) agreement. See, e.g., Raymond's Statement of Exceptions to Decision of the Administrative Law Judge, Exception Nos. 35-45; Raymond's Brief in Support of Exceptions to Decision of the Administrative Law Judge, pp. 23-30.

The ALJ rejected Raymond's argument and found the Confidential Settlement Agreement violative of Section 8(a)(2). The Board, however, did not adopt the ALJ's findings, explicitly stating that it was not adopting the ALJ's findings that Raymond "unlawfully granted 9(a) recognition to the Carpenters on October 1, [2006] and that the Carpenters unlawfully accepted 9(a) recognition on that day" and that "we are not passing on the legality of that [October 1] recognition." (354 NLRB No. 85, slip op. at pp. 1-2.) This is significant because the Board ordered that Raymond,

Withdraw and withhold all recognition from ... [Carpenters Local Union 1506] ... as the collective-bargaining representative of its drywall finishing employees unless and until it has been duly certified by the Board as the collective-bargaining representative of those employees.

Raymond Interior Systems, 354 NLRB No. 85 (2009), adopted by the Board in 355 NLRB No. 209 (2010).

The Board's decision and Order affects the ability of unions and employers in the construction industry to cover new groups of employees under pre-existing multi-employer Section 9(a) agreements where this is done on a Section 8(f) basis. Under the Confidential Settlement Agreement, Raymond and the Carpenters lawfully agreed to apply the Carpenters' agreement to the drywall finishing employees upon expiration of the Painters' 8(f) agreement. This conduct, which allowed the drywall finishing employees to be covered by a union agreement giving wage increases and improved benefits, should be encouraged, not punished. Applying the Carpenters' agreement to the drywall finishing employees on a Section 8(f) basis did nothing to take away the employees' free choice to select a bargaining representative. If the Painters or the employees wanted to challenge this 8(f) agreement, they could have filed a representation petition.

The Board's Order is unwarranted if Raymond had a pre-existing 8(f) agreement at the time of the alleged Section 8(a)(2) violations found by the ALJ and adopted by the Board. Extant Board precedent under Zidell Exploration, Inc., 175 NLRB 887 (1969) holds that a pre-existing 8(f) agreement is not invalidated by subsequent acts of unlawful assistance. Thus, even though the Board did not adopt the ALJ's findings that the Confidential Settlement Agreement was unlawful, the Board's Order requires that Raymond rescind its lawful Section 8(f) agreement. This is contrary to existing Board law under Zidell. Likewise, by not ruling on the validity of the Confidential Settlement Agreement, the Board failed to distinguish Board precedent under Zidell or articulate why its existing precedent under Zidell was not applicable herein to the parties' pre-existing 8(f) agreement. The Board's Order simply invalidates this 8(f) agreement without any

¹ As noted by the Board, the Board's <u>Raymond</u> decision reported at 354 NLRB No. 85 was the subject of petitions for review and an application for enforcement in the Ninth Circuit Court of Appeals. <u>See Raymond Interior Systems</u>, 355 NLRB No. 209. In the brief to the Ninth Circuit, the Board's appellate counsel argued that it was irrelevant whether Raymond and the Carpenters had a Section 8(f) relationship as of October 1, 2006, contending that the "Board found that, irrespective of whatever

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explanation as to why this result is warranted.

The Board's Order also violates national labor policy promoting the enforcement of collective bargaining agreements that are lawful and valid. The policy of labor relations stability in the Act "favors requiring parties to adhere to a voluntarily adopted collective bargaining agreement." John J. Deklewa & Sons, 282 NLRB 1375, 1386 (1987). Accordingly, in Deklewa, the Board held that a collective bargaining agreement authorized by Section 8(f) would be enforceable during its term, and both the employer and union would be required to adhere to the agreement absent the union being decertified or replaced by another union in a Board-conducted election. Id. at 285. In the instant case, Raymond and the Carpenters had a Section 8(f) agreement which was not found to be unlawful by the Board, and the Carpenters were neither decertified nor replaced in a Board election. However, the Board's Order invalidates this lawful Section 8(f) agreement without explanation as to why this result is warranted. Because the Section 8(f) agreement between Raymond and the Carpenters was presumptively valid absent a contrary Board finding, the Board's remedy departs from the national labor policy promoting the enforcement of lawful Section 8(f) agreements, and accordingly reconsideration of the Board's Order is warranted.

The Board's failure to rule on Raymond's 8(f) defense violates due process, and otherwise presents grave due process concerns. In <u>Zidell</u>, the Board expressly acknowledged that "in the absence of clear Congressional intent," a rule invalidating a Section 8(f) agreement because of subsequent acts of unlawful assistance by an employer for which the employer is alone found responsible is constitutionally suspect. <u>Zidell</u>, <u>supra</u> 175 NLRB at 888 (presents "constitutional

relationship might have existed on October 1, when Raymond and the Carpenters coerced the employees on October 2, any prior bargaining relationship was irretrievably broken." See Brief of the National Labor Relations Board, Ninth Circuit Case Nos. 09-73210, 10-70208, 10-70209, 10-71342, at pp. 47-48, which can be found on the Board's website. The Board, however, did not make such a finding by the original two member panel, and no such finding was made in the Board's most recent decision.

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difficulties"). Here, there was no Board finding that the Carpenters engaged in any unlawful conduct during the October 2, 2006 meeting where the unlawful statements were allegedly made by Raymond's representatives. In fact, the ALJ actually dismissed allegations in the General Counsel's complaint that the Carpenters engaged in any unlawful conduct at this meeting. (354 NLRB No. 85, slip op. at p. 22, fn. 61.) Yet, the Board's Order invalidates the Section 8(f) agreement between Raymond and the Carpenters based solely on Raymond's alleged unlawful statements at the October 2 meeting, which occurred after the Confidential Settlement Agreement was in place. Thus, the Board's Order punishes the Carpenters by invalidating their Section 8(f) agreement thereby presenting the very "constitutional difficulties" that troubled the Board in Zidell. Moreover, because the Board's authority is limited to remedying unfair labor practices found by the Board and expunging "only the actual" consequences of the unfair labor practices, Torrington Exend-A-Care Employee Association v. NLRB, 17 F.3d 580, 585 (2d Cir. 1994), punishing the parties by invalidating their Section 8(f) agreement without a finding that it was unlawful violates the due process rights of Raymond and the Carpenters. The Board's Order is unwarranted absent an actual finding by the Board that Raymond's 8(f) agreement with the Carpenters was unlawful or an actual finding that the Carpenters engaged in any unlawful conduct at the October 2 meeting, neither of which were found by the Board herein.

Second, Raymond moves for reconsideration on the grounds that the Board's Order is contrary to the statute, vague and punitive. The Board's Order forever precludes Raymond and Carpenters Local 1506 from entering into a Section 8(f) agreement covering such employees.

Because Raymond is a construction industry employer, Section 8(f) and applicable precedent permit Raymond and Carpenters Local 1506 to enter into an 8(f) agreement covering Raymond's drywall finishing employees, even in the absence of a Board election establishing Carpenters Local 1506 as the Section 9(a) representative of those employees. As more fully set forth below,

the Board's Order prohibiting Raymond and Carpenters Local 1506 from entering into a Section 8(f) agreement after each has complied with the other remedial provisions of the Board's Order is vague and also exceeds the Board's statutory authority because it is punitive.

Third, Raymond moves for reconsideration of the Board's Decision and Order on the grounds that it does not comply with the mandate of the United States Supreme Court's decision in New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010).

As more fully noted below, Raymond submits that in light of the tortured procedural history of this matter, the extensive evidentiary record, the wholesale and verbatim adoption of the decision of the original two-member panel, and the timing of the various Board decisions herein, it is not readily apparent that the Board, as it so stated, "considered the judge's decision and the record in light of the exceptions, cross-exceptions, and briefs." Raymond submits that, while technically complying with the three-member panel requirement, the Board's Decision and Order herein does not comply with the mandate of New Process Steel, warranting reconsideration.

II. FACTUAL SUMMARY PERTINENT TO MOTION FOR RECONSIDERATION

The most recent CBA between Raymond and the Painters to which Raymond was a signatory was the Southern California Drywall Finishers Joint Agreement that was effective from October 1, 2003, through September 30, 2006 ("2003-2006 WWCCA/Painters CBA"). This CBA covered Raymond's drywall finishing employees and it is undisputed that it was entered into pursuant to Section 8(f) of the Act. (354 NLRB No. 85, slip op. at p. 7.)

In May 2006, Raymond's CEO, Travis Winsor, decided to terminate Raymond's collective-bargaining relationship with the Painters. As a result, on May 24, Winsor notified the Painters and the employer association of which it was a member that Raymond was resigning its membership and intended to terminate the 2003-2006 WWCCA/Painters CBA effective

September 31, 2006. (354 NLRB No. 85, slip op. at p. 8.)

After giving notice to the Painters and the WWCCA, Raymond and the Carpenters entered into a September 12, 2006 "Confidential Settlement Agreement," that stated, in part:

WHEREAS, disputes and grievances have arisen between the parties about proper assignment of drywall finishing and other work to the proper trade, craft, and group of employees, and the parties desire to settle said disputes through a confidential settlement agreement

NOW, THEREFORE, for and in consideration of the mutual promises and agreements set forth, the parties agree as follows:

- 1. Raymond agrees to sign the Southern California Drywall/Lathing memorandum agreement 2006–2010.
- 2. At the expiration of Raymond's agreement with Painters District Council No. 36 on September 30, 2006, Raymond agrees that to the fullest extent permitted by law it will apply the Southern California Drywall/Lathing Agreement to its drywall finishing work and employees.

(354 NLRB No. 85, slip op. at pp. 8-9; Resp. Exh. 5 (emphasis added).)

It is undisputed that Raymond lawfully withdrew recognition from the Painters as the collective bargaining representative of its drywall finishing employees covered by the 2003-2006 WWCCA/Painters CBA effective September 30, 2006, and lawfully terminated this Section 8(f) agreement. (G. C. Ex 1, Complaint, ¶ 11; 354 NLRB No. 85, slip op. at pp. 7-9.)

It is also undisputed that the Section 8(a)(2) findings of the ALJ that were adopted by the Board occurred on October 2, 2006. <u>Raymond Interior Systems</u>, 354 NLRB No. 85 (2009) and 355 NLRB No. 209 (2010).

II. <u>LEGAL ARGUMENT</u>

A. RECONSIDERATION BY THE BOARD IS NECESSARY BECAUSE RAYMOND HAD A PRE-EXISTING 8(F) AGREEMENT WITH THE CARPENTERS AS OF OCTOBER 1, 2006 BY VIRTUE OF THE CONFIDENTIAL SETTLEMENT AGREEMENT, THE BOARD DID NOT ADOPT THE ALJ'S FINDINGS AS TO THIS AGREEMENT AND, AS A RESULT, THE BOARD'S ORDER IS UNWARRANTED AND VIOLATIVE OF RAYMOND'S DUE PROCESS RIGHTS.

In the proceedings before the ALJ and the Board, Raymond contended that, on October 1, 2006, it lawfully recognized the Carpenters as the representative of the drywall finishing

employees under Section 8(f) by virtue of the Confidential Settlement Agreement between Raymond and the Carpenters. The ALJ rejected Raymond's argument and found this agreement violative of Sections 8(a)(2). The Board, however, did not adopt the ALJ's findings regarding the validity of the settlement agreement. As the Board stated, "We are not passing on the legality of that [October 1] recognition." (354 NLRB No. 85, slip op. at p. 2.) Nevertheless, the Board ordered Raymond to "[w]ithdraw and withhold recognition from ... [Carpenters Local Union 1506] ... as the collective-bargaining representative of its drywall finishing employees unless and until it has been duly certified by the Board as the collective-bargaining representative of those employees." Raymond Interior Systems, 354 NLRB No. 85 (2009), adopted by the Board in 355 NLRB No. 209 (2010).

Because the Board did not rule on the validity of the Confidential Settlement Agreement, reconsideration is warranted by the Board. The Board's Order is unwarranted if Raymond had a valid pre-existing 8(f) agreement as of October 1, 2006, and cannot be based on a finding by the ALJ that even the Board did not adopt. While the Board's appellate counsel defended the Board's Order in the Ninth Circuit on the grounds that this 8(f) agreement was "irretrievably broken" by subsequent unlawful conduct allegedly engaged in by Raymond, "it is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." Local Joint Executive Board of Las Vegas v. NLRB, 309 F.3d 578, 583 (9th Cir. 2002) (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983).

Here, it is undisputed that Raymond lawfully terminated its CBA with the Painters effective September 30, 2006. In order to resolve disputes arising under Raymond's existing

² Additionally, the Complaint did not allege that Raymond engaged in unlawful conduct on October 1, 2006. (G.C. Exh. 1, Complaint ¶¶ 12,15, 21.) Given the foregoing, it would be unwarranted to base any unlawful findings on any conduct occurring on or before October 1. GPS Terminal Services, 333 NLRB 968, 969 (2001).

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CBA with the Carpenters stemming from Raymond's intended termination of its Painters' CBA, Raymond and the Carpenters entered into a Confidential Settlement Agreement on September 12, 2006. This agreement stated:

- Raymond agrees to sign the Southern California Drywall/Lathing Memorandum Agreement 2006-2010.
- At the expiration of Raymond's agreement with Painters District Council No. 36 on September 30, 2006, Raymond agrees that to the fullest extent permitted by law it will apply the Southern California Drywall/Lathing Agreement to its drywall finishing work and employees. (Resp. Exh. 5, 354 NLRB No. 85, slip op. at pp. 8-9.)

The ALJ rejected Raymond's contention that upon expiration of the Painters' 8(f) agreement, and effective October 1, the Confidential Settlement Agreement with the Carpenters created a Section 8(f) agreement covering Raymond's drywall finishing employees. The ALJ did so on the specious basis that: (1) the phrase "to the fullest extent permitted by law" in the settlement agreement meant that Raymond intended to establish a 9(a) relationship covering its drywall finishing employees; (2) the settlement agreement did not "constitute" a collective bargaining agreement; and (3) that entering into this settlement agreement was unlawful because it was done so during the term of the Painters' CBA. (354 NLRB No. 85, slip op. at pp. 19-22.) Because the Board did not adopt these findings by the ALJ, there has been no finding by the Board that the Confidential Settlement Agreement was unlawful.

Neither substantial evidence nor applicable Board precedent supported the ALJ's findings. The ALJ's adverse findings were addressed in the exceptions and supporting brief filed with the Board by Raymond, and will not be repeated herein. Raymond will, however, address the ALJ's findings that the Confidential Settlement Agreement did not "constitute" a collective bargaining agreement. Likewise, Raymond will also address the ALJ's finding that entering into this settlement agreement was unlawful because it was done so during the term of the Painters' CBA.

Here, the record did not support the ALJ's refusal to accept the Confidential Settlement

Agreement as "constituting" a collective-bargaining agreement. In this regard, the ALJ inexplicably noted that "nothing in the document's preamble suggests the parties intended to create a collective-bargaining agreement or even meant to establish terms and conditions of employment." (354 NLRB No. 85, slip op. at p. 21.) However, the ALJ completely ignored the language of Paragraph 2 of the Confidential Settlement Agreement that expressly and unequivocably states that Raymond "will apply the Southern California Drywall/Lathing Agreement to its drywall finishing work and employees." See Resp. Exh. 5 (emphasis added). Clearly, the import of this language is to establish the "terms and conditions" that would apply to the drywall finishing employees, and it was undisputed that the Drywall/Lathing Agreement contains terms and conditions of employment.

While the ALJ concluded that "there is no record evidence herein that the parties intended their settlement agreement to constitute a collective-bargaining agreement, [footnote omitted] the term bargaining unit is not mentioned and the document bears no expiration date" (354 NLRB No. 85, slip op. at p. 21), the ALJ's conclusion was not supported by substantial evidence. First, as noted above, the Confidential Settlement Agreement in Paragraph 2 expressly identifies the drywall finishing employees, and sufficiently describes the bargaining unit. Second, the ALJ ignored the fact that the Drywall/Lathing Agreement specifically referenced in the Confidential Settlement Agreement contained an expiration of June 30, 2010. See Resp. Exh. 4. Under Board law, the Confidential Settlement Agreement, by referring to and incorporating the terms and conditions of the Southern California Drywall/Lathing Agreement to the drywall finishing employees bargaining unit, constituted a collective bargaining agreement. See, e.g., Local Union No. 530 (Cape Construction Company, Inc.), 178 NLRB 162, 164 (1969) (Parties' oral agreement that terms of mainline pipeline collective bargaining agreement "would be enforced on this particular job" and construction project would be governed by the terms of the agreement was

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"legally sufficient" to make mainline contract operative as a collective bargaining agreement between parties.)

Indeed, the Board was correct in not adopting the ALJ's findings vis-à-vis the Confidential Settlement Agreement because the ALJ exceeded his authority in finding that "as counsel for the Painters Union persuasively argues, if, as argued, the parties did enter into a collective-bargaining agreement via the confidential settlement agreement, such would have been an unlawful act," (354 NLRB No. 85, slip op. at p. 21.) In so finding, the ALJ ignored the fact that the Complaint did not allege that the entering into of the Confidential Settlement Agreement constituted a violation and the General Counsel never amended the Complaint to so allege. Under well-established Board precedent, the ALJ could not base a violation of Sections 8(a)(1) on the argument or alternative theories of Painters' counsel. See e.g., ATS Acquisition Corp., 321 NLRB 712 (1996). Additionally, the ALJ's extra-judicial finding ignored the Board's decision in Acme Tile & Terrazzo Co., 306 NLRB 479 (1992). In Acme Tile, the ALJ and the Board found that an addendum signed by employer-members binding them to a Section 8(f) multi-employer association agreement with a bricklayers local union that was signed during the term of the association's Section 8(f) carpenters agreement, but which became effective after expiration of the Section 8(f) carpenters agreement, was a lawful 8(f) agreement. Id. at 480 ("we agree with the judge that the Respondent Association lawfully entered into an 8(f) agreement with Bricklayers Local 1").

Based on the foregoing, and the fact that the Board did not rule otherwise, a lawful Section 8(f) agreement between Raymond and the Carpenters covering the drywall finishing employees existed as of October 1, 2006. See Deklewa, supra, 282 NLRB at 1385 fn. 41 (collective bargaining agreements in the construction industry are presumed to be 8(f) contracts). Even if Raymond engaged in subsequent conduct violative of Section 8(a)(2) on October 2, this

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would not invalidate this pre-existing Section 8(f) agreement under applicable Board precedent. A Section 8(f) agreement continues to remain valid where the 8(a)(2) assistance or support occurred wholly after the parties had already executed their Section 8(f) agreement. Zidell Explorations, Inc., 175 NLRB 887 (1969). Thus, in Zidell, the Board stated that,

[We] do not read Section 8(f) as permitting, much less as requiring, the invalidation of a prehire contract, allowable under that Section and valid when entered into, simply because of subsequent acts of unlawful assistance for which the employer party to the contract has alone been found responsible . . . Section 8(f), if it is true, imposes as one of the conditions that an employer may "make" such an agreement only with a labor organization "not established, maintained, or assisted by any action defined in Section 8(a) of the Act as an unfair labor practice." That condition, however, speaks only as of the time of the making of the contract and obviously refers to antecedent unfair labor practices.

Id. at 888 (emphasis in original). See also Luke Construction Company, 211 NLRB 602, 605 (1974) (post 8(f) contract assistance not a proper basis for ordering withdrawal of recognition or rescission of an otherwise valid Section 8(f) agreement).

Because the Board did not rule on Raymond's defense that it had a valid pre-existing Section 8(f) agreement, it ignored relevant precedent by failing to explain why such precedent was not controlling. The Board cannot ignore its own relevant precedent, but rather must explain why it is not controlling. Cleveland Construction Co. v. NLRB, 44 F.3d 1010, 1016 (D.C. Cir. 1995). This is precisely what the Board did here in not ruling on Raymond's Section 8(f) defense, thereby warranting reconsideration herein.

Because Raymond and the Carpenters had a lawful and enforceable Section 8(f) agreement which pre-dated the October 2 meeting, Raymond was legally privileged in maintaining and enforcing this agreement, including its union-security provision vis-à-vis its drywall finishing employees. Although the Board did not adopt the ALJ's findings that the collective bargaining agreement between Raymond and the Carpenters effective October 1, 2006, was unlawful, the Board's Order requires that this agreement must be rescinded. This finding is

contrary to established Board precedent and ignores substantial evidence that a valid Section 8(f) agreement was in place as of October 1, 2006.

The Board's Order violates national labor policy promoting the enforcement of collective bargaining agreements that are lawful and valid. Deklewa, supra, 282 NLRB at 1386 (Labor relations stability in the Act "favors requiring parties to adhere to a voluntarily adopted collective bargaining agreement"). The Board's Order invalidating the Section 8(f) agreement (the Confidential Settlement Agreement) between Raymond and the Carpenters without any explanation from the Board departs from national labor policy promoting the enforcement of lawful 8(f) agreements.

The Board's Order also presents serious due process concerns. In the "absence of clear Congressional intent," a rule invalidating a Section 8(f) agreement because of subsequent acts of unlawful assistance by an employer for which the employer is alone found responsible is constitutionally suspect. Zidell, supra 175 NLRB at 888. Because there was no finding that the Carpenters engaged in any unlawful conduct at the October 2, 2006 meeting where unlawful statements were allegedly made by Raymond's representatives, the Board's Order invalidating the Section 8(f) agreement between Raymond and the Carpenters. The Board's Order punishes the Carpenters by invalidating a lawful 8(f) agreement, thus presenting the "constitutional difficulties" that troubled the Board in Zidell.

For the above reasons, reconsideration by the Board is warranted.

RECONSIDERATION IS WARRANTED BECAUSE THE BOARD'S ORDER PROHIBITING
RAYMOND FROM RECOGNIZING CARPENTERS 1506 AS THE REPRESENTATIVE OF THE
DRYWALL FINISHING EMPLOYEES UNTIL IT HAS BEEN CERTIFIED BY THE BOARD IS
CONTRARY TO THE STATUTE AND APPLICABLE PRECEDENT, AND IS PUNITIVE.

Based on its findings that Raymond violated Sections 8(a)(1), (2) and (3) on October 2, 2006, the Board prohibited Raymond from recognizing Carpenters Local 1506 as the exclusive collective bargaining representative of the drywall finishing employees until it has certified as

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such by the Board. The Board's Order is unwarranted because it is vague and also exceeds the Board's statutory authority because it is punitive.

Under the Act, the Board has the power to issue an order requiring a party who has committed an unfair labor practice to "cease and desist from such unfair labor practice and to take such affirmative action ... as will effectuate the policies of the Act." 29 U.S.C. § 160(c). This statutory command has been interpreted "as vesting in the [NLRB] the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898-99 (1984). The Board's Order, however, cannot stand if it is "shown that the order is a patent attempt to achieve ends other than those that can be fairly said to effectuate the policies of the Act." NLRB v. International Association of Bridge, Structural & Ornamental Iron Workers, Local 433, 600 F.2d 770, 777-78 (9th Cir. 1979), cert. denied, 445 U.S. 915 (1980). Moreover, the Board may not issue a remedial order that is unclear and fails to inform the respondent of what conduct is prohibited. NLRB v. National Garment Co., 166 F.2d 233 (8th Cir. 1948). Additionally, the NLRB lacks authority to punish and its remedy must not be punitive in nature. Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940) ("The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes.").

As the Board in <u>Deklewa</u> noted, a union signatory in the construction industry possesses a "limited 9(a) representative status" under Section 8(f). <u>Deklewa, supra</u> 282 NLRB at 1387.

Because the Board's decision in <u>Deklewa</u> permits Carpenters Local 1506 to enjoy such limited Section 9(a) status, the Board's Order is vague because it fails to inform Raymond of what conduct it is prohibited from engaging in the future. Thus, it is unclear from the Board's Order whether Raymond is only prohibited from recognizing Carpenters Local 1506 as the exclusive bargaining representative under Section 9(a) or whether the Board's prohibition also prohibits

Raymond from recognizing Carpenters Local 1506 as a limited Section 9(a) representative under Section 8(f). Because the Board's Order is unclear and vague, reconsideration by the Board is warranted.

"It is the Board's practice to remedy violations by restoring, to the extent feasible, the status quo ante, reconstructing the circumstances that would have existed but for the lawful conduct." Rochester Manufacturing Co., 322 NLRB 260, 263 (1997). To the extent the Board's Order prohibits Raymond and Carpenters Local 1506 from entering into any Section 8(f) agreement in the future covering the drywall finishing employees, the Board's Order goes beyond reconstructing the circumstances that would have existed absent the violations found by the Board. The Board's Order does not restore the *status quo ante* because the *status quo ante* would have permitted Raymond and Carpenters Local 1506 to enter into an 8(f) agreement covering the drywall finishing employees.

Aside from the foregoing, to the extent that the Board's Order would <u>forever</u> preclude Raymond and Carpenters Local 1506 from entering into an agreement covering the drywall finishing employees, absent a Board certification that Carpenters Local 1506 is the exclusive collective bargaining representative, the Board's Order is punitive in nature. Because a plain reading of Section 8(f) clearly reveals Congress' intent in permitting unions and employers to enter into non-majority collective bargaining agreements, the Board's Order is inconsistent with the unambiguous text of Section 8(f). Where a statute's meaning is plain, the Board "must give effect to the unambiguously expressed intent of Congress." <u>Holly Farms Corp. v. NLRB</u>, 517 U.S. 392 (1996). The Board has clearly not done so in this matter.

In Zidell, supra 175 NLRB at 888, the Board stated:

"Section 8(f), it is true, imposes as one of its conditions that an employer may 'make' such an agreement only with a labor organization 'not established, maintained or assisted by any action defined in Section 8(a) of the Act as an unfair labor practice.' That condition, however, speaks only as of the time of the making of the contract."

(emphasis added). The Board's own construction of Section 8(f) in Zidell therefore establishes that Raymond and Carpenters Local 1506 could lawfully enter into a Section 8(f) agreement covering the drywall finishing employees at some future date so long as at the time of entering into the agreement there was no unlawful assistance. Thus, if Raymond indeed violated Section 8(a)(1), (2) and (3) by entering into a 9(a) collective bargaining agreement covering the drywall finishing employees on October 2, 2006 as found by the Board, after otherwise remedying these violations, Raymond (and the Carpenters) should not be barred forever from entering into a Section 8(f) agreement covering these employees. Here, the Board has inexplicably ignored applicable precedent and, as a result, its Order cannot be enforced. Cleveland Construction Co., supra 44 F.3d at 1016. Moreover, as noted by the Supreme Court in Republic Steel, supra, 311 U.S. at 10, the Act does not impose "death penalties" or "life sentences" for its violations and, as a result, the Board's Order is punitive and unwarranted requiring reconsideration by the Board.

C. RECONSIDERATION BY THE BOARD IS WARRANTED BECAUSE THE BOARD'S DECISION AND ORDER DOES NOT COMPLY WITH THE UNITED STATES SUPREME COURT'S DECISION IN NEW PROCESS STEEL.

As noted by the Board, its decision in <u>Raymond Interior Systems</u>, 355 NLRB No. 209, was issued following <u>New Process Steel</u> and after the case was remanded to the Board by the Court of Appeals for the Ninth Circuit. An intervening decision in this matter, reported at 355 NLRB No. 148, was issued on August 27, 2010, by a Board panel consisting of members Liebman, Schaumber, and Becker, less than one day following the Ninth Circuit's remand.³ This intervening decision was purportedly revoked by the Board on September 2, 2010. <u>See</u> September 2, 2010 "Order Revoking." A mere 28 days later, the Board issued its most recent

³ The Board's decision reported at 355 NLRB No. 148 stated that the Board's two-member panel decision in <u>Garner/Morrison LLC</u>, 353 NLRB 719 (2009), had recently been reaffirmed by a three-member panel in <u>Garner/Morrison LLC</u>, NLRB No. (2010). See 355 NLRB No. 148, fn. 3. At the time, however, the Board's decision in Garner/Morrison LLP was still (and is still) pending before the Court of Appeals for the District of Columbia Circuit.

decision in this matter.

A cursory review of all three decisions makes it apparent that the Board merely substituted the names of members Liebman, Becker and Pearce (355 NLRB No. 209) for the names of Liebman, Schaumber and Becker (355 NLRB No. 148) in its various reiterations of the Board's decisions herein. In fact, other than the elimination of any reference to its Garner/Morrison LLC decision, the text of the Board's two decisions adopting the invalid two-member panel decision is substantively the same, and both of the three-member panels appear to have mechanically adopted verbatim the invalid decision of the Board's two-member panel, including the latter's reliance on Garner/Morrison LLC, 353 NLRB 719 (2009), a decision which is currently pending before the Court of Appeals for the District of Columbia.

While the Board's two subsequent three-member panel decisions state that each of the members "considered the judge's decision and the record in light of the exceptions, cross-exceptions, and briefs," it is unlikely that due consideration was given by each of the three members issuing the decision in Raymond Interior Systems, 355 NLRB No. 148, a decision that was issued less than one day following the Ninth Circuit's remand. The entire record in this case is voluminous, consisting of a hearing transcript of over 600 pages, numerous exhibits consisting of over 350 pages, a 41-page ALJ decision, exceptions by Raymond and the Carpenters, cross-exceptions, brief in support of exceptions and cross-exceptions, answering briefs, and reply briefs. Given the voluminous record before the Board, the three-member panel (consisting of the addition of member Becker) could not have reached a decision, let alone a reasoned decision, in less than 24 hours as reported in the Board's decision at 355 NLRB No. 148, and such decision was more likely prompted by the imminent departure of member Schaumber on August 28, 2010. Likewise, it is improbable that given the voluminous record herein, the three-member panel consisting of Liebman and Becker (panel members of the decision at 355 NLRB No. 148) and the

addition of Pearce, reached a reasoned decision less than 28 days later. Rather, it appears that the invalid decision of the two-member Board panel was merely rubber-stamped. This is apparent from the comparison of the two subsequent Board decisions in this matter. Thus, the Board's latest decision (355 NLRB No. 209) states that member Becker "concurs in the result" (a leftover from the Board's "revoked" decision) implying that member Pearce participated in the decision reported at 354 NLRB No. 85, when he did not, and fails to address whether member Pearce also "concurs in the result." As is the case with a court reviewing a Board decision, the three-member Board panel herein cannot ignore its responsibility under New Process Steel to be more than a mere "rubber stamp" of the invalid two-member panel Board decision. See, e.g., NLRB v. Chatfield-Anderson Co., Inc., 606 F.2d 266 (9th Cir. 1979). Merely rubber stamping the invalid two-member panel decision violates Raymond's due process rights. Accordingly, reconsideration is warranted.

III. **CONCLUSION**

For the reasons noted above, Raymond Interior Systems, Inc. requests that its motion for reconsideration be granted, and that the Board reconsider its Decision and Order herein.

DATED: October 27, 2010

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Respectfully submitted,

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Attorneys for Respondent

RAYMOND INTERIOR SYSTEMS, INC.

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CERTIFICATE OF SERVICE

I, Richard S. Zuniga, declare as follows:

I hereby certify that on October 27, 2010, I filed RESPONDENT RAYMOND INTERIOR SYSTEMS' MOTION FOR RECONSIDERATION in Cases 21-CA-37649 and 21-CB-14259, via E-Filing, and I caused the original and eight (8) copies of the foregoing document to be placed in a sealed envelope and sent overnight delivery via Federal Express as follows:

> Lester A. Heltzer, Executive Secretary National Labor Relations Board 1099 - 14th Street N.W. Washington, D.C. 20570 Tel: (202) 273-1067

I hereby certify that on October 27, 2010, I caused to be served true copies of RESPONDENT RAYMOND INTERIOR SYSTEMS' MOTION FOR RECONSIDERATION in Cases 21-CA-37649 and 21-CB-14259, by first-class U.S. Mail and by E-Mail on the following parties:

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I hereby certify that the foregoing is true and correct. Executed this 26th day of October 2010, at Los Angeles, California. Richard A. Zunga Richard S. Zunga

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